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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

**No. 509.**

DENIS J. DRISCOLL, THOMAS C. BUCHANAN,  
DONALD M. LIVINGSTON, RICHARD J. BEAM-  
ISH and JOHN SULLIVAN, Individually and Con-  
stituting PENNSYLVANIA PUBLIC UTILITY  
COMMISSION; and UTILITY CONSUMERS  
LEAGUE OF YORK, PA.,

*Appellants,*

v.

EDISON LIGHT & POWER COMPANY,

*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

**BRIEF FOR THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NEW YORK  
AMICUS CURIAE.**

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## SUBJECT INDEX AND ARGUMENTS.

	PAGE
Statement of Facts .....	2
Interest of Public Service Commission of New York .....	2
Temporary Rate Statute of New York .....	2
Argument	
1. The Pennsylvania Statute is Constitutional ..	4
Purpose of the statute is to provide a	
method to promptly fix temporary rates..	4
Temporary rate base is definite and easily	
determined .....	5
Requirement for correction of error is	
absolute .....	6
Rates under statute can not be unconstitu-	
tional .....	7
Statute provides certain method for recoup-	
ment of losses .....	8
2. Prendergast v. New York Telephone Com-	
pany, Distinguished .....	11
3. Opinion of New York State Court of Appeals	
in Bronx G. & E. Co. v. Maltbie, discussed..	15
Conclusion .....	23

### TABLE OF AUTHORITIES.

Bronx Gas & Electric Co. v. Maltbie, 271 N. Y.	
364 .....	4, 15
Prendergast v. New York Telephone Company, 262	
U. S. 43 .....	4, 6, 11, 12, 13, 15, 16
San Diego Land & Town Co. v. Jasper, 189 U. S.	
439 .....	9
United States Light & Heat Corp. v. Niagara Falls	
Gas & Electric Co., 47 Fed. (2d) 567 .....	10
Wright, J. M., <i>et al.</i> v. Central Kentucky Natural	
Gas Company, <i>et al.</i> , 297 U. S. 537 .....	9

## II.

### STATUTES.

#### PAGE

Section 310 Pennsylvania Public Utility Law . . .	5, 6, 8, 11, 12, 14
Section 72 Public Service Law of New York . . . . .	12
Section 114 Public Service Law of New York . . . . .	2

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The Public Service Commission (State Division, De-  
partment of Public Service) of the State of New York  
having an interest in the litigation adverse to Edison  
Light & Power Company, Appellee, presents the fol-  
lowing brief as *amicus curiae*.

## Statement of Facts.

This is an appeal by Denis J. Driscoll *et al.*, individually and constituting the Pennsylvania Public Utility Commission and Utility Consumers League of York, Pa., from an order of the United States District Court for the Eastern District of Pennsylvania granting a permanent injunction against temporary rates fixed by the Pennsylvania Public Utility Commission.

### Interest of Public Service Commission of the State of New York.

By Chapter 287 of the Laws of 1934 of the State of New York the Public Service Law of the said state was amended by adding section 114, which section authorizes the Public Service Commission, under certain conditions and subject to certain restrictions and provisions, to fix temporary rates for public utilities under its jurisdiction pending the determination of final rates. This section of the Public Service Law of the State of New York provides:

§ 114. TEMPORARY RATES. To facilitate prompt action by the commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding, the commission is hereby authorized to require any public utility company to establish, provide and maintain continuing property records, including a list or inventory of all the physical property actually used in the public service, and to require any public utility company to keep its books, accounts and records in such manner as to show currently the original cost of said physical property and the reserves accumulated to provide for the

retirement or replacement of said physical property.

The commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding. Said temporary rates so fixed, determined and prescribed shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided.

Temporary rates so fixed, determined and prescribed under this section shall be effective until the rates to be charged, received and collected by said utility company shall finally have been fixed, determined and prescribed. The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section, to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding.

It will at once be noted that the above quoted section is similar in its provisions and purposes to section 310 of the Pennsylvania Public Utility Law.



The constitutionality of the New York State statute has been upheld by the highest court in that State (*Matter of Bronx Gas and Electric Company v. Maltbie*, 271 N. Y. 364), and the Public Service Commission of the State of New York is now, in appropriate proceedings, exercising the rights and jurisdiction conferred by this section of its law.

## ARGUMENT.

### POINT I.

**Section 310 of the Pennsylvania Public Utility Law, so far as it authorizes that Commission to fix temporary rates, is constitutional.**

It is plain that the law making bodies of the State of Pennsylvania in enacting section 310 of the Pennsylvania Public Utility Law exercised the greatest care to meet the objections laid down by this Court to certain statutes of other states authorizing the establishment of temporary rates when no provision was made protecting the utility if such temporary rates were finally found to be too low to pay a reasonable return on the property of the public utility (*Prendergast v. New York Telephone Company*, 262 U. S. 43). The statute was, therefore, drawn laying down a simple rule that could be promptly applied by the state commission in establishing a temporary rate base and providing a sure method by which the utility is assured of repayment of all amounts lost if the temporary rates are subsequently found inadequate.

### *Temporary Rate Base*

Under existing utility acts of many states, temporary rates could not be established until the regulatory body had considered all facts relevant to a determination of a fair return on present value. This requirement was an almost insurmountable handicap to effective regulation of utilities and had repeatedly made it impossible for such regulatory commissions to effect a needed temporary reduction in rates. In numerous cases, despite the fact that the old rates were obviously excessive, consumers were required to pay excessive rates during the entire pendency of a rate proceeding, and until permanent rates were established by such commissions. Because of this lack of power to fix temporary rates during the progress of rate proceedings, the utilities in many instances have availed themselves of every conceivable pretext for delay.

It is very apparent that section 310 of the Pennsylvania Public Utility Law was enacted mainly to remedy this defect. Under this section the Pennsylvania commission is authorized to consider the original cost less accrued depreciation as a rate base. Both these elements are definite, certain and readily ascertainable from the records of the company. If the utility does not have such records the Commission is authorized to fix a rate based upon the results of operations during a prior year plus or minus a return on the net changes in the physical property of the company as reported to the Commission.

The primary object of this section is to facilitate prompt action so that where the Commission deter-

mines that the public interest requires its action, temporary rates may be established during the progress of a rate proceeding. As a result of this method of procedure the consumer may have the benefit of reduced rates when warranted by the facts and the utility will have an incentive to do everything in its power to aid in the prompt and expeditious determination of the rate proceeding.

### *Power to Correct Errors*

The temporary rates fixed by the New York State Public Service Commission and condemned by this Court in *Prendergast v. N. Y. Tel. Co. (supra)* were to all intents final rates. Because of this fact the utility could never make up the loss in revenues which it suffered by reason of the inadequacy of the temporary rates there fixed.

However, the temporary rates fixed pursuant to section 310 of the Pennsylvania Public Utility Law are not subject to this fatal objection. The section provides that any discrepancy in the temporary rates below those finally determined the utility shall be permitted to amortize and recover by means of a temporary increase over and above the rates that would otherwise have been fixed as being just and reasonable. Said section 310 plainly requires:

1. That at the conclusion of every rate investigation in which temporary rates have been established the Commission must first determine what rates would be sufficient to pay to the utility a fair return upon the present value of its property used and useful in the public service and that in

making this determination all factors laid down by this Court in *Smyth v. Ames*, 169 U. S. 466, and in subsequent decisions, must be followed.

2. That a comparison must then be made between the rates so determined and the temporary rates.
3. That if from such comparison it appears that the temporary rates are less than those finally determined, the utility must be authorized to collect rates in excess of compensatory rates for a period sufficiently long to allow it to recoup the losses it sustained while the temporary rates were in effect.

*Temporary Rates Established Pursuant to Section 310 of the Pennsylvania Public Utility Law Cannot Be Confiscatory*

How can the action of the Pennsylvania Public Utility Commission, acting under the authority of this section, possibly result in a confiscation of the utility's property? If the Commission exercises the power granted by section 310 and fixes temporary rates reducing the rates charged by the utility the company is of course deprived of a certain amount of revenue during the effective period of such temporary rates, but it is not the deprivation of revenue itself that would render the statute unconstitutional as confiscatory. There can be no confiscation under any law unless it permanently deprives a person of property or compensation therefor. This is what the Constitution says cannot be done.

A utility is entitled to a fair return upon the present value of its used and useful property during the entire

period of its use and it cannot be *permanently* deprived of any of this revenue. It was to satisfy this constitutional requirement that section 310 was enacted.

Section 310 specifically commands the Commission to adjust the final rates so as to permit the utility to recoup any loss it may have sustained during the period the temporary rates were in effect. Under this statute how can the appellee claim that it will be permanently deprived of any money to which it may be entitled under the Constitution? It is emphasized that the constitutional prohibition against confiscation is against the *permanent* deprivation of property or compensation for its uses and any statute which protects a person against any such *permanent* deprivation and guarantees full payment for every minute of its use cannot become confiscatory.

*Section 310 of the Pennsylvania Public Utility Law Provides a Certain Source and Means of Repaying the Utility's Losses Sustained by Reason of Temporary Rates.*

The opinion of the Circuit Judge holds that section 310 (a) was unconstitutional in that the provisions for recoupment are entirely ineffective in view of the fact that "if the consumer discontinues the service or moves out of the territory, as doubtless in a shifting population will be frequently done, the utility in many cases will be absolutely without remedy \* \* \*." We believe that the Court misconstrued the provisions of the act. The requirement is not that each individual consumer make up in future rates the amount that he personally saved during the temporary rate period, rather, the act

authorizes increased rates that will be collectible from all consumers taking service during the recoupment period. Such a provision is entirely legal. No individual has any right to a particular rate, be it reasonable or otherwise. Only the public has the right to demand service at reasonable rates. What constitutes a reasonable rate for the public is prescribed by statute and is not subject to constitutional limitations. Under section 310 the Commission is required at the conclusion of a rate investigation to fix reasonable rates for service which shall permit a utility to earn an amount sufficient to

1. Provide a fair return upon the present value of its used and useful property;
2. An amount in addition thereto to permit the utility to recoup any loss which it may have suffered during the effective period of such temporary rates.

A rate sufficient to provide a utility with both amounts is a reasonable rate under the laws of the State of Pennsylvania and no consumer has the right to demand service at any lower rate.

That only the public, not the individual, has a right to demand service at reasonable rates has always been recognized. This was clearly held by this Court in *San Diego Land and Town Co. v. Jasper*, 189 U. S. 439; *J. M. Wright et al. v. Central Kentucky Natural Gas Company et al.*, 297 U. S. 537. It is our understanding of these cases that this Court has held that individual consumers have no vested interest in rates charged for service by a utility; that only the public has the right to demand service at any particular rate, and that the public is represented by its duly elected or appointed

public officers acting in their official capacity. The same general rule is laid down in *United States Light & Heat Corporation v. Niagara Falls G. & E. Co.*, 47 Fed. (2d) 567; certiorari denied, 283 U. S. 864, where it was specifically held that a consumer had no right to demand service at any particular rate and that such rights as he may possess existed only by reason of the provisions of the Public Service Law. In the course of its opinion the Court held:

*"A consumer or prospective consumer of gas in the territory has only such right as the Public Service Law gives him to complain of charges or service. As a general rule, a seller may fix the price of his produce at what he pleases or dispose of it at any price, but the courts have determined that, where property is affected with a public interest it is no longer juris privati; it becomes clothed with a public interest when used and sold in a community under a franchise grant. Thus the gas company's business becomes subject to the Public Service Law by reason of the interest which the public has. It must submit to the control by the Public Service Commission for the common good to the extent which it has clothed its property with public interest. But a citizen has no vested rights in statutory privileges or exemption. Cooley, Constitutional Limitations (8th Ed.) 792. This gas company became bound to furnish gas within the city of Niagara Falls by reason of the Public Service Law. The consumer was not obliged to purchase gas; he was privileged to do so. A private right may be interfered with so long as it is not vested (Cooley, Constitutional Limitations [8th Ed.] 749), and a right is not vested unless it is something more than a mere expectation as may be based upon an anticipated continuation of the present general laws (Brooklyn Union Gas Co. v.*



City of New York, 50 Misc. Rep. 450, 100 N. Y. S. 570)."

• • • • •

"The plaintiff and the intervener Hamann have no property rights which are affected by subdivision 6 of section 65 forbidding service charge. *Their right to service exists only because of the statute referred to. It is not such property right as may form the basis of a claim for confiscation or discrimination.* If there be an exercise of arbitrary power against the consumer and wrongful enforcement by the Commission of the Public Service Law, a remedy is afforded under the provisions referred to for the consumer to lodge his complaint, obtain a hearing and redress. City of Rochester v. Rochester Gas Co., 233 N. Y. 39, 134 N. E. 828 \* \* \*" (Italics ours.)

Under section 310 the public—the body which had the benefit of the reduced rates during their effective period—would have to make up the loss, if any, occasioned to the company during the effective period of the temporary rates. The mere fact that the individual consumer may have changed would be immaterial, and no property rights of such consumers could be adversely affected.

## POINT II.

The decision of this Court in *Prendergast v. New York Telephone Company*, 262 U. S. 43, is not authority for the holding that section 310 of the Pennsylvania Public Utility Law is unconstitutional.

The Court below apparently based its decision that the temporary rate provision of the Pennsylvania



statute was unconstitutional largely upon the determination of this Court in *Prendergast v. New York Telephone Company*, 262 U. S. 43, and that Court quotes at some length from this decision.

The rates enjoined in the *Prendergast* case were fixed by the New York State Public Service Commission pursuant to section 72 of the Public Service Law of that State. This section contained no provision providing for recoupment by the utility of insufficient temporary rates. This Court, therefore, held that under this section both temporary and permanent rates were alike in that temporary rates were final for the period they remained in effect and because of the finality of such rates there must be considered in fixing the rate base and rate of return all the elements that are relevant in fixing final rates.

Section 310 of the Pennsylvania Utility Law provides a very different procedure than that condemned by this Court in passing upon the old New York State statute. A comparison of the basic provisions of the two statutes will show that the method now before this Court differs essentially from the method prescribed in section 72 of the New York State Public Service Law. Placed in juxtaposition these provisions are:

SECTION 72 of the Public Service Law of the State of New York passed upon in the *Prendergast* case.

SECTION 310 of the Pennsylvania Public Utility Law now before this Court.

#### TEMPORARY RATE BASE

All relevant facts affecting a proper determina-

Original cost less accrued depreciation of the phy-

tion of the present fair value of the property.

sical property used and useful in the public service.

### RATE OF RETURN

Must be sufficient to provide a reservation for surplus and contingencies together with a reasonable average return upon the present value of property.

Must be sufficient to provide a return of not less than 5% upon the original cost less accrued depreciation of the physical property.

### POWER TO CORRECT ERRORS IN TEMPORARY RATES AND SAFEGUARD UTILITIES FROM LOSS

No provision. (The temporary rates are final for the period they remain in effect and can not affect the final determination.)

If final rates are in excess of the temporary rates the public utility must be permitted to amortize and recover by means of a temporary increase such sum as shall represent the difference between the gross income obtained from the temporary rates and the gross income which would have been obtained under the final rates.

In the course of its opinion in *Prendergast v. N. Y. Tel Co.*, (*supra*), this Court said:

"\* \* \* The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a

*reasonable return upon its property during such period WITHOUT REMEDY, unless their enforcement should be enjoined \* \* \** (P. 49).  
(Italics ours.)

From our study of this opinion, it appears that the injunction against the enforcement of temporary rates are affirmed for two reasons:

1. The temporary rates were *final and conclusive* during their effective period.
2. That unless enjoined the company would be without remedy.

As stated by the Court at page 51:

*"\* \* \* The Company meanwhile could only be protected from loss by injunction; while, on the other hand, its subscribers were protected by the bond which was required for the return of the excess charges collected if the injunction should be thereafter dissolved. There was no necessity in the particular situation presented for any test period of the new rates."* (Italics ours.)

The situation presented on this appeal is of an entirely different nature. Here there is a necessity for a test period of new rates and here the company is amply protected against any loss arising from the temporary rates.

As has already been pointed out, temporary rates prescribed by the Commission under section 310 are not final and conclusive. If it be determined after full and complete hearing that the appellee was deprived of an adequate return on the present value of its property during the effective period of the tem-

porary rates, the Commission is commanded to make provision in the final rates prescribed to permit the utility to recoup the amount of its loss.

Rather than be authority for the holding that the temporary rate provision of the Pennsylvania statute is unconstitutional, we believe that the opinion of this Court in *Prendergast v. N. Y. Telephone Co.*, (*supra*), definitely points out what method of procedure must be provided in a statute to bring it within the requirements of the Constitution. As we have already pointed out, the Pennsylvania act complies in every respect with these requirements.

### POINT III.

The discussion and reasoning contained in the opinion of the New York State Court of Appeals in matter of Bronx Gas and Electric Company y. Maltbie, 271 N. Y. 364, is applicable to the facts and law here presented.

On July 8, 1936, the Court of Appeals of the State of New York rendered its decision in an appeal involving an order of the Public Service Commission of the State of New York fixing temporary rates for the Bronx Gas and Electric Company. As we have previously pointed out, the New York State statute attacked in the Bronx case and the Pennsylvania Act held unconstitutional by the District Court are so similar that the opinion of Chief Judge Frederick E. Crane is entirely applicable. This opinion so clearly and logically answers every finding of Judge Davis in his opinion holding the Pennsylvania Act uncon-

stitutional that we will quote at length from Judge Crane's opinion. For convenience we have divided the opinion under several headings.

*Prendergast v. New York Tel. Co.*, 262 U. S. 43, *Distinguished*.

"To sustain the ruling of the court below, reliance is placed upon *Prendergast v. New York Tel Co.*, (262 U. S. 43), in which Mr. Justice SANFORD wrote the opinion. Under the law as it then existed, the Commission of this State had fixed a temporary rate, pending final determination of the fair and reasonable rate. This was held to be confiscatory and the temporary injunction issued by the United States District Court was upheld on appeal. Mr. Justice SANFORD in his opinion said: 'Nor did the fact that the orders of the Commission merely prescribed temporary rates to be effective until its final determination, deprive the company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate making process' (p. 49).

“Certain things were established by this decision: (1) The temporary rate is confiscatory if it denies a fair return upon the Company’s investment, that is, the temporary rate must give a fair return upon all those elements of capital value which must be considered in fixing the final rate. Of course this means that no temporary rate can ever be fixed, for, having all the elements upon which to fix a final rate, there is no necessity of calling it a temporary one. (2) The temporary rate, as fixed by the Commission in this *Prendergast* case, was a final rate, as the law had provided no means by which the company could be repaid its loss, should it finally be determined that the temporary rate was too low. (3) The court recognized that the public was entitled to a remedy and that the company could not profit through delays in legal procedure. It, therefore, recognized the practice of requiring the company, upon obtaining a preliminary injunction, to give a large bond, conditioned upon the repayment to consumers of the overcharges, if it should finally be determined that the Public Service Commission was right.” (Pages 369-370.)

*Is it Possible for a State Legislature or Congress to Provide by Statutes for the Fixing of Temporary Rates?*

“After this decision the Legislature of the State of New York was confronted with this *quære*: Was it ever possible to compel public service corporations to charge reasonable rates, pending the long drawn-out and interminable proceedings to establish a fair return? The establish-

ment of the proper base rate, or the present capital investment, upon which a company is entitled to a fair return, has become an intricate, involved, tedious proceeding, extending into months and years. Much of the evidence produced is expert testimony, varying in worth and uncertainty, presenting a maze of detail and figures. (*City of Louisville v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430.) Without suggesting in any way that the public service corporations have not acted with utmost good faith, we can see the opportunity, as did the Legislature, for the intentional delay in these proceedings whereby unwarranted profits may be obtained. The fixing of a reasonable rate by these public service corporations, who enjoy from the public such valuable franchises, to be of any value, should be a matter of speedy regulation. The courts should not encourage such *finesse* in figuring as to make these hearings upon rate questions an obstruction instead of a relief. Of course caution must be used on both sides, for the desire for improper gain is oftentimes as eager with the consumer, or his spokesman, as with the corporation.

“Recognizing the present-day conditions surrounding the difficulty in determining the proper rate, we come back to the question: Is it possible for the law, Legislature or Congress to provide for a temporary rate, pending these lengthy hearings? The Legislature evidently had in mind all that I have here said regarding the *Prendergast* case and the difficulties there pointed out when in 1934, by chapter 287 of the laws of that year, it added section 114 to the Public Service Law.

• • •” (Page 371.)



### *Requirements of a Legal Statute Fixing Temporary Rates*

"We note at once that the temporary rate shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation of the physical property of the utility company used and useful in the public service. At least there is some accuracy in these figures; they can be fixed with some certainty and are not dependent altogether upon speculative expert opinion. (*Clark's Ferry Bridge Co. v. Public Service Com.*, 291 U. S. 227.)

"These are not all the factors, however, which must be taken into consideration in fixing finally a fair return or rate, or any rate for that matter, which has the effect of being final. According to *Smyth v. Ames* (169 U. S. 466) other elements must be considered in order to ascertain capital value—the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property, and the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters of consideration and are to be given such weight as may be just and right in each case. Other elements besides these may enter into the problem, according to circumstances. (*West v. Chesapeake & Potomac Tel. Co.*, 295 U. S. 662.) Therefore, we must conclude, in fact it is apparent and conceded that if this temporary rate, fixed according to this added



section, is to be final, or has any element of finality, it is unconstitutional and void.

"We cannot imagine the Legislature, in the face of the *Prendergast* case, doing such a foolish thing as reenacting, though in different language, a law giving the Public Service Commission power to do that which the United States Supreme Court had determined it could not do. The Legislature, evidently by section 114, intended to meet the criticism in the *Prendergast* case and to follow the way impliedly pointed out for a proper law. If the courts required the public utility company to put up a bond to pay back to the consumers the overcharges which it had exacted, pending a hearing, why was it not just as feasible and legal to turn the remedy about and provide that the consumers or the public should make good to the company the loss which it may have sustained in temporarily exacting too little? This is what our Legislature has done, and this we think is the meaning which we must give to its language, if it is to have any sense at all in the light of the past." (Pages 372-373-374.)

#### *Provisions for Recoupment of Any Loss Sustained During the Temporary Rate Period*

"The Commission fixes a temporary rate pending the hearing. It is based upon the elements stated, which are not all of those required to fix a permanent rate. As before stated, this would be impossible, if we must consider in fixing a temporary rate all the elements required for the final rate: no temporary rate could ever be fixed. This also is self evident. Therefore, to meet these con-

ditions the temporary rate is fixed, within reasonable limits, upon figures which can be with some exactness obtained from the books of the company, showing original cost or investment; and if finally, when the proceeding ends, the temporary rate is proved to have been too low, the utility must be permitted and authorized to charge enough for its service to make up the loss. The consumer must pay what he should have paid, and the only way to do it is to fix a rate high enough to make up this loss.

“True it is that all the consumers paying the final rate, including the take-up, may not be the same as those who paid the temporary rate. A few consumers may be new customers paying what the old consumer should have paid. Such instances are of minor importance, the percentage must be very small. We can never work our institutions of government if we refine matters to such an extent that we have to consider all these little details. The Constitution expresses fundamental principles, and if in the main these have been observed, this is all that can be required. Besides, when we speak of the consumer—the customer—we mean the public, not individuals. (*San Diego Land & Town Co. v. Jasper*, 189 U. S. 439.)

“Anyhow, this is no concern of the company, for its complaint here is that because of the temporary rate it will suffer loss. If the loss is made up to it in the final rate the objection is obviated. That the Commission is authorized, in fact compelled, to make up this loss, if any, through the final rate, is the meaning and must be the meaning of these words in section 114: ‘The commission is

hereby authorized in any proceeding in which temporary rates are fixed \* \* \* to consider the effect of such rates in fixing \* \* \* rates \* \* \* on final determination \* \* \* 'Experience'—how much better this is than expert testimony, whether dealing in history or prophecy. (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 669.)

"This section, as we have said, forces the Public Service Commission to consider the returns from the temporary rate and to establish the permanent rate, or the final rate, accordingly; that is, if the temporary rate has proved to be too low the final rate must make it up to the company. Over what time it is necessary to provide a rate sufficient to make up the loss, or to include the take-up, is a matter of adjustment, machinery and method. These matters are all in the hands of the Public Service Commission, which may increase or modify a rate to meet the circumstances at any time. Here is no *nunc pro tunc* rate as in *Oklahoma Natural Gas Co. v. Russell* (261 U. S. 290)." (Pages 374-375.)

### *Court's Conclusion*

"We, therefore, are of the opinion that this law is not unconstitutional; that it meets the defects in prior procedure, and affords the company ample protection as well as the consumer. It is a fair attempt to meet the time element, which is necessary to be considered in rate-fixing hearings." (Page 375.)

**Conclusion.**

In conclusion the Public Service Commission of the State of New York urges that this Court determine:

1. That section 310 of the Public Utility Law of the State of Pennsylvania is constitutional.
2. That the injunction restraining the enforcement of the order of the Pennsylvania Public Utility Commission fixing temporary rates should be dissolved.

Respectfully submitted,

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